

11-10-95

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

| | | |
|--------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Revision of Rules and Policies |) | IB Docket No. 95-168 |
| for the Direct Broadcast |) | PP Docket No. 93-253 |
| Satellite Service |) | |

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF CONTINENTAL CABLEVISION, INC.

Robert J. Sachs
Howard B. Homonoff

CONTINENTAL CABLEVISION, INC.
The Pilot House
Lewis Wharf
Boston, MA 02110
(617) 742-9500

Michael H. Hammer
Michael G. Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

Attorneys for
Continental Cablevision, Inc.

November 30, 1995

TABLE OF CONTENTS

| | PAGE NO. |
|--|----------|
| I. INTRODUCTION AND SUMMARY | 1 |
| II. DOJ'S PROPOSED BAN ON MSO PARTICIPATION IN DBS IS AN UNJUSTIFIED DEPARTURE FROM ITS POSITION IN THE PRIMESTAR CONSENT DECREE | 3 |
| III. DOJ'S CONCERN THAT MSO DBS OPERATORS WILL NOT AGGRESSIVELY COMPETE IS THEORETICAL AND CONTRARY TO THE AVAILABLE EVIDENCE | 5 |
| IV. DIRECTV'S ARGUMENTS IN FAVOR OF CABLE/DBS CROSS- OWNERSHIP LIMITATIONS ARE ENTIRELY SELF-SERVING | 7 |
| V. CONCLUSION | 10 |

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

| | | |
|--------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Revision of Rules and Policies |) | IB Docket No. 95-168 |
| for the Direct Broadcast |) | PP Docket No. 93-253 |
| Satellite Service |) | |

REPLY COMMENTS OF CONTINENTAL CABLEVISION, INC.

Continental Cablevision, Inc. ("Continental") respectfully submits these Reply Comments in the above-referenced Notice of Proposed Rulemaking.¹ Continental is a 10 percent owner of PRIMESTAR.

I. INTRODUCTION AND SUMMARY

Continental focuses in this Reply on the Comments filed by the Justice Department ("DOJ") and DirecTV. DOJ's comments are entirely theoretical; DOJ cites no facts to support its theories notwithstanding that three years of marketplace evidence is available to them. DirecTV, on the other hand, is motivated entirely by the desire to constrain its competitors, as evidenced by the recent comments of Michael Smith, Vice Chairman of

¹ Notice of Proposed Rulemaking, FCC 95-443, IB Docket No. 95-168, PP Docket No. 93-253 (released October 30, 1995) ("Notice" or "NPRM").

DirectTV's parent, Hughes Electronics Corp., concerning the Commission's Advanced² decision:

"It is fortuitous that MCI has raised the issue of an auction [for a DBS license]. We ordinarily do not support auctions, but in this case, it is going to help us because it is going to delay the process of a competitor using that orbital slot."³

Specifically, DOJ's far-reaching proposals to restrict cable operator participation in DBS are inconsistent with the highly competitive nature of the DBS business and actually would reduce DBS competition. In addition, DOJ's proposals should be rejected for the following reasons:

- In 1993, the Justice Department entered into a consent decree with PRIMESTAR which established the bases upon which the PRIMESTAR cable owners could participate in the DBS business. There are no changed circumstances which justify the Department's proposals. If anything, the DBS business is more competitive today than it was in 1993.
- The Justice Department's theoretical concern that cable operators will not aggressively compete in DBS ignores the fact that cable operators already do compete aggressively in the DBS business.

Likewise, the Commission should reject DirectTV's self-serving efforts to limit DBS competition. As demonstrated below, DirectTV's fears that cable operators will cross-subsidize the DBS business are unfounded. Cable systems are subject to rate regulation or, in the alternative, subject to competition. As explained below, either circumstance prevents the cross-subsidization DirectTV fears. Finally, DirectTV's desire to

² Advanced Communications Corp., FCC 95-428 (adopted Oct. 16, 1995) ("Advanced").

³ Space News, at 22 (Oct. 9-15, 1995)

prohibit cable-affiliated DBS operators from obtaining exclusive programming rights is particularly cynical given the fact that a principal focus of DirectTV's national advertising campaign centers on its exclusive rights to valuable sports programming, such as NFL and NBA games.

II. DOJ'S PROPOSED BAN ON MSO PARTICIPATION IN DBS IS AN UNJUSTIFIED DEPARTURE FROM ITS POSITION IN THE PRIMESTAR CONSENT DECREE

DOJ states that it "believes that the Commission should adopt a structural rule which prohibits cable firms above a specified size from owning, controlling or using DBS channels in any of the three primary. . .full-CONUS orbital slots."⁴ This proposal is directly contrary to the PRIMESTAR consent decree⁵ entered into by the Justice Department in April, 1994, which allowed PRIMESTAR's MSO owners to enter the DBS business. DOJ justifies its new position by stating that "DBS service has the potential to be a closer substitute for cable television than does medium power fixed satellite service."⁶ DOJ's reasoning is flawed, and its proposal ignores the reality of the DBS business.

First, DOJ's attempt to draw a distinction between medium and high power DBS for the purpose of limiting MSO entry into the latter is specious; the evidence to the contrary is overwhelming.

⁴ DOJ Comments at 9.

⁵ U.S. v. PRIMESTAR Partners, L.P., Final Judgement, 1994-1 Trade Cas. (CCH) ¶ 70,762, 1994 U.S. Dist. LEXIS 14978, (S.D.N.Y. 1994).

⁶ DOJ Comments at 3.

In the NPRM, the Commission tacitly acknowledges that PRIMESTAR competes with other DBS operators,⁷ and PRIMESTAR is explicitly included as a DBS competitor in the Commission's annual assessment of competition in the MVPD marketplace.⁸ DirectTV acknowledges that PRIMESTAR competes in the DBS business in its comments in this proceeding.⁹ DirectTV devotes advertising resources to portraying PRIMESTAR's service in a negative light,¹⁰ and DirectTV has modified its price structure as a result of competitive pressure from PRIMESTAR.¹¹ Industry trade publications routinely characterize PRIMESTAR as competing with DirectTV and USSB.¹² The conclusion is inescapable; PRIMESTAR competes with DirectTV and USSB for the same customers. If it obtains full-CONUS, high-power DBS authorization, PRIMESTAR will be operated in the same manner as it is currently, *i.e.*, local distributors selling a national service. DOJ's suggestion that PRIMESTAR is not a substitute for high-power DBS simply cannot be credited.

⁷ Notice at ¶ 57.

⁸ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, 10 FCC Rcd 7805, 7813 (1995) ("Competition NOI").

⁹ DirectTV Comments at 2, 3, 18.

¹⁰ See Continental Comments at n.12, and attachment.

¹¹ Continental Comments at 8.

¹² See, *e.g.*, "Hubbard Predicts 20M-30M DBS Subscribers Within 10 Years," Satellite News, October 2, 1995; Gibbons, Kent, "FCC Could Decide PRIMESTAR Fate," Multichannel News, October 9, 1995; Burgi, Michael, "DBS Targets Cable Subs," MEDIAWEEK, September 25, 1995.

Second, DOJ completely ignores the fact that the DBS business, as well as the broader MVPD marketplace, is more competitive today than it was when the consent decree was negotiated, not less competitive.¹³ Thus, there is even less justification for limiting cable operator participation in DBS than when the Consent Decree was entered.

Finally, neither the Commission nor the Justice Department cite any evidence of anticompetitive behavior by PRIMESTAR in support of the proposed entry barriers. PRIMESTAR has been in business for four years -- beginning prior to DOJ's filing and extending for two years beyond when the terms of the consent decree were negotiated -- without, to the best of Continental's knowledge, a single complaint to either the state attorneys general, the DOJ or the FCC. In the absence of such evidence, structural limitations should not be considered.

III. DOJ'S CONCERN THAT MSO DBS OPERATORS WILL NOT AGGRESSIVELY COMPETE IS THEORETICAL AND CONTRARY TO THE AVAILABLE EVIDENCE

The Justice Department broadly theorizes that MSO-affiliated DBS operators "could have less incentive to offer DBS service that competes against cable," and might "engage in pricing strategies that are less fully competitive with cable rates" or, in an extreme case, "provide grossly inferior DBS service or even

¹³ See Continental Comments at 9-14, PRIMESTAR Comments at 18, 22, Competition NOI at 7813.

no DBS service at all."¹⁴ As demonstrated below, DOJ's purely speculative concerns are entirely contrary to the experience of PRIMESTAR's operation in the DBS marketplace.

Although the Justice Department acknowledges that entering the DBS business "is a costly proposition,"¹⁵ it fails to consider this fact when analyzing the need for structural limits on further MSO participation in DBS. In fact, PRIMESTAR and its MSO owners have spent more than \$1 billion to enter the DBS business, including substantial expenditures on national advertising and local promotions. This investment entirely undercuts any argument that MSO affiliated DBS operators would intentionally undermine their DBS business. Indeed, as businesses providing service to the public, MSOs cannot afford to offer "grossly inferior" DBS service -- such actions place at risk the business' reputation, and hence, its ability to continue as a going concern.

More importantly, PRIMESTAR has competed aggressively in DBS. PRIMESTAR has approximately 880,000 subscribers, or nearly 25% of the DBS business.¹⁶ That percentage falls far short of raising any competitive concerns, and it demonstrates beyond doubt that PRIMESTAR is serious about competing in the DBS business. DOJ's theories that MSOs will somehow "warehouse" DBS

¹⁴ DOJ Comments at 6. DOJ grudgingly acknowledges that the latter concern "may be unlikely in an auction environment." Id.

¹⁵ DOJ Comments at 13.

¹⁶ Continental Comments at 12.

capacity or minimize their competitive efforts are simply not credible in light of PRIMESTAR's competitive performance.

Finally, the speculative, theoretical foundation proffered by DOJ for its proposed cross-ownership ban is insufficient under recent judicial precedent. As noted above, the cable/DBS cross-ownership ban is designed to address DOJ's fear that MSO-affiliated DBS operators will not compete with their own cable operations. However, earlier this year the United States Court of Appeals for the Sixth Circuit struck down a cellular/PCS cross-ownership ban, finding that the argument described above was "unpersuasive, unsupported as it is by any record evidence."¹⁷ The Court went on to say that the FCC is required to "provide at least some support for its predictive conclusions."¹⁸ Not only does DOJ fail to provide any factual support for its proposals, as demonstrated above, the record evidence is expressly contrary to DOJ's predictive conclusions.

IV. DIRECTV'S ARGUMENTS IN FAVOR OF CABLE/DBS CROSS-OWNERSHIP LIMITATIONS ARE ENTIRELY SELF-SERVING

DirectTV's comments are substantially an effort to gain an arbitrary, regulatory advantage in the DBS marketplace by constraining -- or eliminating -- its competition. DirectTV

¹⁷ Cincinnati Bell Telephone Co. v. FCC, Nos. 94-3701/4113; 95-3023/3238/3315, slip op. at 12, (6th Cir. November 9, 1995).

¹⁸ Id., citing Century Communications Corp. v. FCC, 835 F.2d 292, 300-02 (D.C. Cir. 1987) (rejecting FCC's judgment where supported by "scant" evidence), cert. denied, 486 U.S. 1032 (1988).

states that it "has extreme doubts about allowing the cable industry to acquire full-CONUS DBS slots at all."¹⁹ If the FCC allows MSOs to bid for the available frequencies at all, DirecTV supports the imposition of the "stringent conduct rules" proposed by the FCC to "prevent anticompetitive behavior."²⁰

For the reasons discussed above and in Continental's comments, DirecTV's suggestions will impede competition, and will only promote the interests of DirecTV, a competitor, not the public interest. The DBS business already is competitive, and will become more competitive in the near future with the anticipated launch of EchoStar Satellite Corporation's full-CONUS DBS satellite.²¹

Moreover, DirecTV already has gained a huge competitive advantage because it did not pay for its spectrum at auction, while any auction "winner" will incur not only the substantial start-up costs of any DBS entrant, but an added penalty attributable only to regulatory fiat. DirecTV's transparent attempts to further skew the regulatory climate in its favor should not be credited.

¹⁹ DirecTV Comments at 13.

²⁰ Id.

²¹ See, Public Notice, EchoStar Satellite Corporation "Request for Removal of Conditions, Minor Modification and Issuance of Launch Authority," File No. 15-SAT-MP/LA-96, Report No. SPB-32, released November 22, 1995.

Similarly, DirecTV's professed concern that cable operators will subsidize DBS service with cable revenues²² is unfounded. First, cable systems are subject to rate regulation; even where such regulation is not imposed (because the local franchising authority and/or cable subscribers have not requested such regulation), future rate changes provide additional opportunities for the imposition of such regulation, at which time the cable operator will be required to justify its rates. Thus, cable operators are restrained from increasing their cable rates to subsidize a DBS offering. Second, where cable systems are subject to effective competition, cross-subsidy is not possible because rate increases will result in loss of market share. Indeed, notwithstanding the rate regulations, the rates offered by DirecTV provide a check on cable rates nationwide. DirecTV's unsubstantiated and speculative cross-subsidy concerns do not warrant further attention.

Finally, DirecTV's strident requests for program access restrictions are another example of DirecTV's cynical efforts to procure an arbitrary regulatory advantage and should, likewise, be rejected. DirecTV trumpets its exclusive programming deals with the National Football League and the National Basketball Association in its national advertising, but comes to the Commission -- with unclean hands -- asking that this opportunity be denied its competitors. The Commission should flatly reject such transparent requests for regulatory hand-outs. However, to

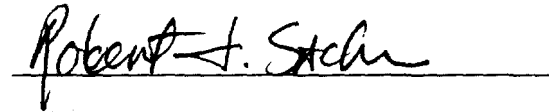
²² DirecTV Comments at 18, 19.

the extent the Commission does impose program access-type limitations, including restrictions on exclusivity, they ought to apply equally to all DBS operations.

V. CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Commission reject the proposed structural and behavioral limits on cable participation in the DBS business, and decline to adopt the suggestions of the Department of Justice and DirecTV.

Respectfully submitted,
CONTINENTAL CABLEVISION, INC.

A handwritten signature in dark ink, appearing to read "Robert J. Sachs", is written over a horizontal line.

Robert J. Sachs
Howard B. Homonoff

Michael H. Hammer
Michael G. Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

CONTINENTAL CABLEVISION, INC.
The Pilot House
Lewis Wharf
Boston, MA 02110
(617) 742-9500

November 30, 1995

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 30th day of November, 1995, copies of the foregoing Reply Comments of Continental Cablevision, Inc. were delivered by hand, unless otherwise indicated, to the following parties:

John Nakahata
Assistant to the Chairman
Federal Communications Commission
1919 M Street, NW
Room 814
Washington, DC 20554

James R. Coltharp
Special Advisor to Commissioner Barrett
Federal Communications Commission
1919 M Street, NW
Room 826
Washington, DC 20554

Lauren J. Belvin
Senior Legal Advisor to
Commissioner Quello
Federal Communications Commission
1919 M Street, NW
Room 802
Washington, DC 20554

James L. Casserly
Senior Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, NW
Room 832
Washington, DC 20554


Scott Blake Harris
International Bureau
Federal Communications Commission
2000 M Street, NW
Room 658
Washington, DC 20554

Richard Welch
Legal Advisor to Commissioner Chong
Federal Communications Commission
1919 M Street, NW
Room 844
Washington, DC 20554

Gary M. Epstein*
James W. Barker
Latham & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, DC 20004-2505

Counsel for DirecTV, Inc.

Anne K. Bingaman*
David Turetsky
Donald J. Russell
Michael Hirrel
Kate Balaban
Andrew S. Cowan
Frank Lamancusa
Department of Justice
Antitrust Division
555 4th St., NW, Rm. 8104
Washington, DC 20004

A handwritten signature in cursive script, reading "Alexnetta Manson". The signature is written in dark ink and is positioned above a horizontal line.

*Delivered by first-class, postage pre-paid mail